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it is for the court where the alleged causes of danger are so open and obvious, and the servant's knowledge or opportunity for knowledge so complete, as to leave no doubt that he knew or ought to have known all about them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.* 9 Va.-W. Va. Enc. Dig. 726.]

6. Master and Servant (§ 276*)—Injury to Servant—Proximate Cause—Evidence.—Evidence in an action for death of a miner from a runaway car held insufficient to show that the condition of the air course was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.* 9 Va.-W. Va. Enc. Dig. 721.]

7. Master and Servant (§ 97*)—Duty of Master—Foreseeing Danger.—The master is required to foresee and guard against only the usual and probable danger, and so is not liable on account of the condition of the air course in a mine, in which a miner was caught by a runaway car, where he would have been safe if met there by a car operated as usual.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.* 9 Va.-W. Va. Enc. Dig. 689.]

Error to Circuit Court, Dickenson County.

Action by Jewell Cruise's administrator against the Clinchfield Coal Corporation. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. H. House, of Clintwood, *J. Norment Powell*, of Bristol, and *Morison, Morison & Robertson*, for plaintiff in error.

Sutherland & Sutherland, of Clintwood, for defendant in error.

DIXON LIVERY CO. v. BOND.

Sept. 9, 1915.

[86 S. E. 106.]

1. Trial (§ 9*)—Separate Trials in Cause—Issues—Partnership.—Where, in an action by plaintiffs alleged to constitute a partnership, defendant denied the partnership and filed other pleas, the court could, within its discretion, direct a trial on the issue of partnership and submit that issue to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 6, 7; Dec. Dig. § 3.* 10 Va.-W. Va. Enc. Dig. 894.]

2. Pleading (§ 411*)—Failure to Object—Plea of Set-Off—Sufficiency.—A plea of set-off, in an action by partners on a check given by defendant for goods bought, which alleges that a partner was in-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

debted to defendant in excess of the amount of the check, that the partner held himself out to be a sole trader and did not disclose to defendant that he was trading for the firm, that defendant had neither notice nor knowledge of the firm at or before the issuance of the check, but believed that the partner was trading as sole trader, and that the sum due from the partner to defendant remained unpaid, and that defendant offered, according to the statute, the sum as a set-off, is good in the absence of any demurrer or exception thereto on account of its form.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1384, 1385; Dec. Dig. § 411.* 10 Va.-W. Va. Enc. Dig. 896.]

3. Partnership (§ 162*)—Set-Off and Counterclaim (§ 44*)—Mutuality of Obligations—Partners.—A partner who holds himself out and who trades as a sole trader is an agent of his undisclosed principal, and one having no knowledge of the existence of the partnership may set off claims against the partner acquired before knowledge of the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 296-299; Dec. Dig. § 162; Set-Off and Counterclaim, Cent. Dig. §§ 82-96, 98, 99; Dec. Dig. § 44.* 10 Va.-W. Va. Enc. Dig. 854.]

Error to Circuit Court, Wise County.

Action by I. P. Kane and others, a partnership doing business under the firm name of D. S. Bond, against the Dixon Livery Company. There was a judgment for plaintiffs, and defendant brings error. Reversed and cause remanded.

Bond & Bruce, of Wise, for plaintiff in error.

Vicars & Peery, of Wise, for defendants in error.

E. SUTHERLAND & CO. v. GIBSON.

Sept. 9, 1915.

[86 S. E. 108.]

1. Time (§ 11*)—Time of Delivery—Fraction of Day.—Where a particular day or time is appointed for delivery of goods or the payment of the price, the party to the contract has the whole of the day for performance on his part; and such right is not affected by a custom, where the contract was not entered into in pursuance thereof.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 53; Dec. Dig. § 11.* 3 Va.-W. Va. Enc. Dig. 421.]

2. Customs and Usages (§ 15*)—Evidence—Admissibility.—Parol evidence is admissible to show the custom of the locality where a contract was made, or the usage of trade with reference to which,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.